United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7250

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TO BE ARGUED BY
HYMAN BRAVIN, ESQ.

- -x

LAWRENCE I. WEISMAN, on his own behalf and on behalf of JAMES L. WEISMAN, HARRY WEISMAN and BELLE WEISMAN,

Plaintiffs-Appellants,

- against -

PIERRE J. LELANDAIS, SHEILA CLEJAN WEISMAN, EUGENE LEYTRESS, NICHOLAS R. DOMAN and SHEILA MAURA KAHOE,

Defendants-Appellees.

USCA #75-7250

B

P/S

ROSEMARY T. FRANCISCUS,

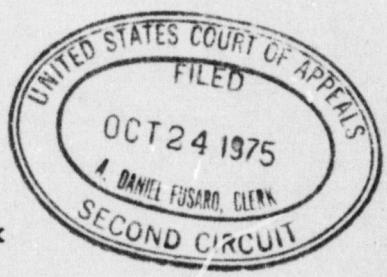
Plaintiff-Appellant,

- against -

PIERRE J. LELANDAIS and SHEILA C. WEISMAN,

Defendants-Appellees.

USCA $75-7264



Appeal From the United States District Court for the Southern District of New York

- x

APPELLANTS' JOINT BRIEF

HYMAN BRAVIN
Attorney for Appellants
6 East 45th Street
New York, New York 10017
212 697-1055

UNITED STATES COURT OF APPEALS
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- -x

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APPE ANTS' JOINT BRIEF

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

QUESTION PRESENTED

Page

WHETHER THE ENDORSEMENT BY THE DISTRICT COURT, "MOTION GRANTED. THE COMPLAINT IS DISMISSED. SO ORDERED" (A. 50, 51*) IS A "FINAL ORDER" UNDER 28 U.S.C. SEC. 1291 FROM WHICH THIS APPEAL CAN LIE. 5

OPINIONS BELOW

The opinions below have not been reported. They appear in the joint appendix (A. 50 and 51), and read:

"Motion granted. The complaint is dismissed.

SO ORDERED."

The orders were both filed on March 12, 1975 and are dated March 10, 1975 and March 11, 1975, respectively.

PROCEDURAL HISTORY

In May 1974, plaintiff-appellant Rosemary T. Franciscus ("Franciscus") and plaintiff-appellant Lawrence I. Weisman ("Lawrence") filed separate actions in the United States District Court for the Eastern District of New York, charging violation of their rights under the Civil Rights Act, 42

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* Numbers in parentheses preceded by the letter "A" refer to pages in the Appellants' Joint Appendix submitted on this appeal.

U.S.C. Sec. 1983. Franciscus named as defendants, the appellees Pierre J. LeLandais (LeLandais) and Sheila Clejan Weisman (Clejan). Lawrence named LeLandais as the sole defendant. LeLandais and Clejan retained the same attorneys. Their applications to transfer both actions to the Southern District of New York were granted by Judge John F. Dooling, Jr. on July 17, 1974 without any objections from Franciscus and Lawrence.

Prior to the transfer of the action, Lawrence on July 14, 1974 amended his complaint and added as co-plaintiffs his son, James I. Weisman, and his parents, and named four additional co-defendants, his wife, Sheila Clejan Weisman, Eugene Leytress, Nicholas R. Doman (Doman) and Sheila Maura Kahoe (Kahoe) (A. 9). Lawrence has discontinued the action against the appellees Doman and Kahoe (A. 3). Franciscus amended her complaint on August 2, 1974 but added no new parties. Both amended complaints plead actions under the Civil Rights Act, 42 U.S.C. Sec. 1983, and its jurisdictional implementation, 28 U.S.C. Sec. 1343(3).

The defendants-appellees moved to dismiss the amended complaints (A. 37 and A. 46). They submitted in support of their motions under F.R.Civ.P.12(b) supporting affidavits by Kahoe and Doman (A. 39, 41, 46) and served a Memorandum of Law. Plaintiffs-appellants submitted in opposition a 26 page Memorandum

of Law together with exhibits. No oral argument was had and on March 10 and March 11, 1975 Judge Charles E. Stewart, Jr. dismissed the amended complaints with the cryptic endorsement:

"Motion granted. The complaint is dismissed.

SO ORDERED" (A. 50 and 51)

A Notice of Appeal was served and filed from said orders (A. 5 and 7). Thereafter, Hyman Bravin, 6 East 45th Street, New York, New York, was substituted in the place of the attorney for the appellants.

A motion was then made returnable before this Court on September 23, 1975, for the following relief:

(1) dismissing the appeals herein on the ground the issue sought to be raised is not appealable; (2) remanding the cases back to the District Court with permission for the Appellants to file amended complaints; or, in the alternative, (3) should the Circuit Court refuse to pass favorably on the issues raised, the Appellants request additional time to perfect their appeals. On September 23, 1975, PANEL III of this Circuit denied the application "without prejudice to move to dismiss before the Panel that will hear the appeal." (A. 1)

Statement of the Case

The appellant Lawrence and the appellee Clejan are husband and wife. The appellant, James I. Weissman, is their natural son. Since December, 1971, there has been pending a divorce proceeding instituted by Lawrence against Clejan in the New York State Supreme Court, County of New York.

The amended complaints are bottomed on the events that occurred on November 5 and 7, 1972. Both appellants pleaded in their respective amended complaints that the appellees, Lelandais and Clejan, caused their unlawful arrest and detention by law enforcement officers of the City of New York on November 7, 1972. Lawrence was detained for 18 hours (Count VI, A. 19 to 20), and Franciscus suffered extended incarceration for 36 hours and was humiliated and degraded (Count IV, A. 33-35). These charges were dismissed by the Court on application of the New York County District Attorney's office.

In addition, two days prior thereto, Lawrence was falsely accused by Lelandais and Clejan of possessing a gun and threatening and pointing same at them. They charged, in addition, that Lawrence was wanted in New York City on a fugitive warrant. Lelandais and Clejan under the color of

law ... finally caused" Lawrence "to be arrested on a charge of harrassment" (A. 18, Par. 35 thereof). This charge was dismissed by the Family Court of Suffolk County on May 16, 1973.

The District Court's orders of dismissal do not indicate the decision-making rationale. During the research for the appellants' brief on appeal, a serious question of jurisdictional dimension came to light. It was decided that the Notice of Appeals were improvidently taken.

A motion made to this Circuit in the nature of an advisory opinion was inferentially declined, and the Court denied the application with leave to renew before the Panel that will hear the appeal.

POINT I

WHETHER THE ENDORSEMENT BY THE DISTRICT COURT, "MOTION GRANTED. THE COMPLAINT IS DISMISSED. SO ORDERED" IS A "FINAL ORDER" UNDER 28 U.S.C. SEC. 1291 FROM WHICH THIS APPEAL CAN LIE.

A line of cases hold the District Court's memo dismissed the complaint; but, left the action pending.

The Ninth Circuit has written extensively in this area and in Dockery v. Dockery 437 F.2d 898 (1971) again ruled:

> "A dismissal of a complaint, without dismissal of the action, is not a "final order" under 28 U.S.C. Sec. 1291 because the complaint is still open to amendment. Since we find no "special circumstances" here which indicate that the court below determined that the complaint could not be saved by amendment, the order appealed from is not an appealable order." Jackson v. Nelson, 405 F.2d 872, 873 (9th Cir. 1968)."

There, the Ninth Circuit dismissed the appeal "for lack of jurisdiction" and indicated the Appellant "may move in the District Court for leave to file an amended complaint." No "special circumstances" exist here warranting application of the finality rule. Ruby v. Secretary of the United States Navy, 365 F.2d 385, (9th Cir. 1966): Richardson v. U.S., 336 F.2d 265 (9th Cir. 1964): Midwestern Development v. Tulsa City, 319 F.2d 53 (10th Cir. 1963).

The District Court Orders of dismissal do not indicate the decision-making rationale. The Plaintiffs- Appellants were never informed that their amended complaints were improperly drawn or the basis for the granting of the Rule 12(b) motion. Circuit Judge McEntee, speaking for a First Circuit panel, agreed with the Ninth Circuit in Ballou v. General

Electric Co. 393 F.2d 398, at page 400 "that the court should have explained its action". Though not statutorily required, an explanation of the trial court's thinking is a pragmatic necessity, not alone to enable the Appellants to determine whether there is a question worthy of appeal, but also to aid an appellate court in acquiring a clear understanding of the basis of a trial court's decision. On the bare record here, this Court does not have sufficient information to make a judgment "that the court below determined that the complaint could not be saved by amendment". Jackson v. Nelson, supra. Clearly, this Court cannot proceed with any fair degree of confidence to a decision without the benefit of some findings made by the court below. Parenthetically, it is argued, as a general proposition, a statement of the facts and the reasons for the decision would aid a trial judge in the adjudicative process.

In support of this proposition, it is suggested that this Circuit, under sufficiently analagous circumstances, lends some support to this argument.

> "7. Findings of fact and conclusions of law were not necessary. However, where, as here, alternative grounds for action are urged upon the

district court, it is of assistance to the appellate court, in reviewing such action, for the district court to state the specific grounds relied upon. While we could here remand so that this could be done we elect not to do so." Horner v. Ferron 362 F.2d 224 (2nd Cir. 1966)n. 7. p. 229.

This Circuit followed this reasoning in a civil rights case

"A case brought under the Civil Rights Act should not be dismissed at the pleadings stage unless it appears "to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." Barnes v. Merritt, 376 F.2d 8, 11 (5 Cir. 1967). This strict standard is consistent with the general rule. See 2A Moore's, supra at 2245. Clearly it has not been met here, Holmes v. New York City Housing Authority 398 F.2d 262, 265 (1968).

In appraising the sufficiency of a complaint, the United States Supreme Court follows

"...(t)he accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

Procedural restrictions have no place in the federal court system. Courts have allowed amendments of complaints pursuant to F.R.Civ.P.15(a) so that the real issues can be tried and a verdict reached on the merits.

"Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this

> mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), Pars. 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." Foman v. Davis 371 U.S. 178, 181-182 (1962).

It is suggested in balancing a strict Rule 12(b) approach to civil rights cases against the liberal policy favoring Rule 15(a) amendments of complaints, the principle, litigation should be decided on the merits, should prevail. Kauffman v. Moss, 420 F.2d 1270, 1275, 1276 (3rd Cir. 1970). The Appellants ask that this case be remanded for the purpose of affording Appellants an opportunity to amend their complaints.

Merits of Appellants' Causes of Action

Up to this point the Appellants, in the presentation of their argument, have not made any in-depth discussion of the merits of their complaints. It would be presumptuous for this

writer to attempt to divine the lower court's reasons for dismissing the complaint. Fortunately, omniscient powers are not required attributes for members of the Bar.

The Fifth Circuit, in a per curiam opinion, noted and agreed with the District Court, in dismissing a complaint for failure to state a claim upon which relief can be granted, that the complaint is clearly inadequate. However, the Fifth Circuit disagreed with the lower court's holding:

> "... there is no way in which said declaration can be amended so as to state a claim upon which relief can be granted or to state a cause of action" and dismissed the complaint "with prejudice and without leave to amend".

On oral argument, the Circuit Court heard Appellant's suggestions as to several ways the complaint could be properly amended. Without passing on the hypothetical amendments, the Circuit Court dismissed the judgment and granted Appellant leave to amend in the District Court. Sayre v. Shoemaker 263 F.2d 370, 371 (5th Cir. 1959). In the appeals before this Court we do not have a written opinion as in Sayre, supra.

The sufficiency of a complaint on the basis of civil rights statutes must be viewed from the standpoint of notice type pleading:

> "(1) The complaint must be viewed from the standpoint of notice type pleading. Cf. McGuire v. Sadler, 5 Cir., 1964, 337 F.2d 902. By way of analysis, we note that, although brought in five counts, it states only four possible causes of action. Three of these are stated in Count One. Two stem from the allegations which challenge the constitutionality on its face of an Act of the legislature of the State of Florida. ..." Mansell v. Saunders 372 F.2d 573, 574 (5th Cir. 1967).

Here, Plaintiffs-Appellants plead basically a 42 U.S.C. Sec. 1983 civil rights complaint. This Circuit set down the guidelines for a 1983 cause of action:

> "To qualify under Sec. 1983 the right sought to be enforced must in the main be one incapable of pecuniary evaluation, such as personal liberty, unrelated to and not dependent upon an invasion or deprivation of property interests. A suit for the enforcement of such civil rights will, however, not necessarily be removed from the scope of Sec. 1983 because their enforcement may possibly affect property interests where those interests are incidental or ancillary to the basic personal right. Bradford Audio Corp. v. Pious 392 F.2d 67, 72 (1968).

The Appellants have alleged the loss of personal liberty caused by the Appellees, Lelandais and Clejan, acting separately and jointly under the color of state law when they applied for criminal complaints to arrest Appellants Lawrence and Francisus. A private person who obtains an arrest complaint seeks a judicial remedy and thus performs state action within the meaning of 42 U.S.C. Sec. 1983. This week's United States Law Week (October 21, 1975) made this point in another context:

> "The rationale supporting this theory is that a private citizen is acting under color of state law when his action is encouraged by state law and especially when it is possible only by virtue of state law."44 LW 2170.

This reasoning is especially worthy of consideration where, as pleaded by the Appellants, the Appellees entered into a conspiracy for monetary gain to cause the false arrest of the Appellants (A.11, Court I and A.32, Court II).

Surely, if these allegations were substantiated at the trial by competent evidence, that Lelandais and Clejan wilfully and maliciously caused the false and baseless arrest of the Appellants for monetary gain, all without a legitimate purpose, constitutes a claim upon which relief may be granted under Section 1983 of Title 42.

The theory by which state action is imputed to a plaintiff in a garnishment action is equally, if not more applicable, to a criminal complainant whose bad faith or malice can be established.

Surely, the District Court here was in error, if it based its rationale for dismissal of the amended complaints on the ground they fail to state a claim under any state of facts that might be proved in support of allegations presented in this case. A showing of bad faith or malice

would preclude the general rule that state court litigants are not amenable to suit under the provisions of the Civil Rights Act because their activities cannot be considered attributable to the state itself. The allegations in both amended complaints plead proper Section 1983 causes of action. If need be, the complaints can be amended and much of the loose and repetitious allegations of facts can be deleted and the complaint will still remain within the perimeter of a proper Section 1983 cause of action.

CONCLUSION

This Court is asked to rule that the Notices of Appeals are premature and that the cases should be remanded to the District Court with directions that the Orders of dismissal be vacated and leave granted to amend within such reasonable period after vacation of the dismissal orders as may be fixed by the Court.

Respectfully submitted,

HYMAN BRAVIN
Attorney for Appallants

CERTIFICATE OF PERSONAL SERVICE OF APPELLANTS' BRIEF AND JOINT APPENDIX

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

I, HYMAN BRAVIN, attorney for the appellants, certify that on October 24, 1975 I did serve upon Schwenke & Devine, attorneys for the defendants-appellees Pierre J. LeLandais and Sheila Clejan Weisman in the Weisman Appeal (75-7250) and Franciscus Appeal (75-7264) and upon Doman & Beggans as attorneys for the defendant appellee Eugene Leytess in the Weisman Appeal, two copies each of the Appellants' Joint Brief and one copy each of the Joint Appendix to Appellants' Brief, by leaving the same at their respective offices at 230 Park Avenue, New York, New York, and 295 Madison Avenue, New York, New York.

The undersigned affirms the foregoing statements are true under the penalty of perjury.

Dated: New York, New York
October 24, 1975

HYMAN BRAVIN